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JOINT AND SEVERAL LIABILITY OF PARTNERS.

At common law, every contract of a partnership is the joint contract of its members. The firm is not recognized as a legal entity, nor are the partners deemed mere sureties for it. They are primary debtors and joint debtors.

CONSEQUENCES TO CREDITORS.

This doctrine operated to the disadvantage of firm creditors in several ways. If a firm creditor sued upon a firm contract, he was bound to join all of the partners as defendants, and he would be non-suited, if he omitted any. As English law did not require a registration of partnerships, a creditor might be non-suited twenty times before learning the names of all of the members.[1] Lord Mansfield thought it cruel "to turn a creditor round, and make him pay the whole costs of a non-suit, in favour of a defendant, who is certainly liable to pay his whole demand." Hence, he ruled that a creditor should be allowed to recover against one or more of the firm, unless those whom he had named as defendants disclosed their omitted copartners and pleaded the non-joinder in abatement. This is still the rule at law.[2]

Again, as the partners were joint debtors, if the creditor pursued one or more of them to judgment, his cause of action was merged in such judgment, and he could not maintain thereafter, a suit at law against an omitted partner, though he was a dormant

[1]Rice *v.* Shute (1770) 5 Burr. 2611, 2613, 2 W. Bl. 696. Followed in Abbot *v.* Smith (1774) 2 W. Bl. 947.

[2]Armour & Co. *v.* Ward & Co. (1905) 78 Vt. 60, 28 At. 60. In Sandusky *v.* Sidwell (1898) 173 Ill. 493, 50 N. E. 1003, plea in abatement was held unnecessary because the non-joinder appeared on the face of the complaint. Non-joinder so appeared in the Vermont case, but the court held it must be specially pleaded.

partner and for that reason unknown to the creditor when he took his first judgment. The creditor's cause of action, it is held, is founded on a joint contract. Having taken judgment on that against some of the joint promisors, he cannot maintain a second action against them upon it; and he cannot maintain an action against the omitted promisors severally, because their promise was joint and not several.[3]

Again, if the firm creditor released one partner from his partnership indebtedness, he barred himself from a recovery against the others. The joint debt was gone, and he had never secured the several contract of the other partners.[4]

Still again, as the partners were joint debtors, the death of a partner operated at common law, to throw the entire burden of the debt upon the survivor.[5]

RELIEF IN EQUITY.

While the liability for partnership debts survived at law, because of their joint character, this survivorship was not recognized

[3]Ward *v.* Johnson (1816) 13 Mass. 148; Robertson *v.* Smith (N. Y. 1821) 18 Johns. 459, 9 Am. Dec. 227; Smith *v.* Black (Pa. 1822) 9 S. & R. 142, 146, 11 Am. Dec. 686, a judgment once rendered extinguishes the original cause of action, and is a bar, not only to a subsequent action brought against the same persons, but against all others; the judgment puts an end to all litigation on the same subject matter of the action, and a discovery of a new party or the happening of new damages does not give a new cause of action. Moale *v.* Hollins (Md. 1839) 11 G. & J. 11, 33 Am. Dec. 684 with note; McFarlane *v.* Kipp (1903) 206 Pa. St. 317, 55 At. 986; Wann *v.* McNulty (1845) 7 Ill. (2 Gill.) 355, 43 Am. Dec. 58; Mason *v.* Eldred (1867) 73 U. S. (6 Wall.) 231, 18 L. Ed. 783, criticising Sheehy *v.* Mandeville (1810) 10 U. S. (6 Cr.) 253; King *v.* Hoare (1844) 13 M. & W. 493. At p. 503 Parke, B., said: "It is remarkable that this question should never have been actually decided in the courts of this country." He disapproved of Sheehy *v.* Mandeville *supra,* and followed Ward *v.* Johnson *supra.*

[4]Ward *v.* Johnson (1816) 13 Mass. 148, 151, "A release to one joint obligor or promisor will operate as a discharge of the whole;" Bower *v.* Swadlin (1738) 1 Atk. 294, "There is no doubt but a release to one joint obligor is a release in equity to both as well as in law;" Cheetham *v.* Ward (1797) 1 Bos. & P. 630, 633, 4 R. R. 741, "The very point in issue was decided in the year book; and Brian there gives a satisfactory reason for the decision. In fact there is but one duty extending to both obligors; and it was therefore pointedly put that a discharge of one is a discharge of both." *In re* E. W. A. [1901] 2 K. B. 642, 10 L. J. K. B. 810, 85 L. T. 31, 8 Man. 250.

[5]Morr *v.* Southwick (Ala. 1835) 2 Porter 351, 371, "By the common law, the debts of partners are joint; and by the death of one they become extinguished as to his estate, and can only be revived in equity;" Osgood *v.* Spencer (Md. 1828) 2 H. & G. 133, 134, "On a joint contract such as this [a promissory note by partners] the remedy at law exists only against the surviving drawers;" Grant *v.* Shurter (N. Y. 1828) 1 Wend. 148, 150, "In the case of a joint contract, if one of the parties die, his executor is at law discharged from liability, and the survivor alone can be sued."

in equity. Indeed, the rule as to survivorship of firm liability at common law has always been deemed one of procedure.[6] The creditor could not join the surviving partner and the executor of the deceased partner, "for the one is to be charged *de bonis testatoris* and the other *de bonis propiis.*"[7] But equity has always accepted and applied the rule of the Law Merchant as formulated in the maxim, *jus accrescendi inter mercatores locum non habet.* It did not give to the surviving partner full ownership of the firm property, but compelled him to account to the representatives of the deceased partner for the latter's share.[8] On the other hand, it did not subject him to sole liability for firm debts. If sued at law, or compelled otherwise to pay firm debts, it permitted him to charge such payments in the partnership account, and if the firm property was insufficient to satisfy the claims to call on the estate of the deceased partner for contribution.[9] Moreover, it always permitted the firm creditor to proceed directly against the deceased partner's estate.[10]

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[6] *In re* Doetsch, Matheson *v.* Ludwig [1896] 2 Ch. 836, 839, 65 L. J. Ch. 855, 75 L. T. 69, "The Spanish Courts require that a joint creditor shall before he seeks to reach the estate of a deceased partner first proceed against and exhaust or prove insolvency of the joint estate. In my opinion, that is a matter of procedure." White *v.* Com. Gen. Ins. Co. (1910) 34 App. D. C. 460, 468.

[7] Hall *v.* Hussam (1679) 2 Lev. 228. For the same reason, the surviving partners and the executor of the deceased could not join as plaintiffs for the recovery of firm claims, but the survivor had to sue alone. Martin *v.* Crompe (1696) 1 Ld. Ray. 340, Comb. 474, 2 Salk. 444. Holt, C. J., said, "There is here a joint constituting of a bailiff, and therefore the contract will survive; and the bailiff shall have an action against the survivor for his wages. If the bailiff accounts, he shall deduct his charges out of the effects of both; but that which is clear upon the account stated, will belong to the administrator and the survivor, but the survivor shall take the whole, and allow a moiety to the administrator. It would make strange confusion that one should sue in his own right and the other in another's right." *Accord.* Kemp *v.* Andrews (1690) Carth. 170, "The action must necessarily survive, though the interest does not; otherwise there would be a failure of justice, because the survivor and the executors of those who were dead, cannot join in the action, for that their rights are of several matters, and there must be several judgments."

[8] Jeffereys *v.* Small (1683) 1 Vernon 217; Elliott *v.* Brown (1791) 3 Sw. 489. Even common law courts recognize this doctrine. Hammond *v.* Jethro (1611) 2 Brownlow & Gold. 99 note.

[9] Jacomb *v.* Harwood (1751) 2 Ves. Sr. 265. Sir John Strange at p. 268 declared that a surviving partner against whom a judgment has been recovered by a firm creditor, and who was an executor of the deceased partner, might apply assets of this estate to the satisfaction of the firm debt, unless there were circumstances of fraud and collusion. "For," he adds, "certainly the partnership creditors would have a right to go against the separate estates of either of the partners." Lang *v.* Keppelle (Pa. 1809) 1 Binn. 123, 125.

[10] Lane *v.* Williams (1693) 2 Vernon 292; Jacomb *v.* Harwood (1751) 2 Ves. Sr. 265, 268; Lang *v.* Keppelle (Pa. 1804) 1 Binn. 123. In Kendall

It is true that Lord Thurlow[11] and Lord Eldon[12] expressed surprise that equity should permit this. But the real matter for surprise is that they should have had doubts, or that they should have been ignorant of the reasons for the divergent rules in equity and at law, on this point. Sir William Grant shows very clearly in *Devaynes* v. *Noble, Sleeche's Case,*[13] that courts of equity in case of the death of a partner have given effect to the *Lex Mercatoria,* by which "a partnership contract is several as well as joint," differing in this respect from courts of common law. A similar view is expressed by the Court of Appeals of Maryland.[14] It was natural that courts of equity should continue to apply this doctrine of the Law Merchant, even though the courts of law did not. Malynes tells us that "merchants' causes are properly to be determined in the chancery * * * for the customs of merchants are preserved chiefly in the said Court."[15] As the various merchants' courts died out in England, and especially after Lord Bacon's victory over Lord Coke had greatly increased the jurisdiction of chancery, merchants frequently resorted to these tribunals for the adjudication of their disputes. In this way it happened that a rule of the Law Merchant, adopted and applied, by equity courts, came to be considered an anomalous creation of equity.[16]

By the Law Merchant, the liability of partners was joint and several, as well during the life of the partners, as after the death

v. Hamilton (1879) L. R. 4 App. Cas. 509, Earl Cairns, L. C., expresses the view, that the right of firm creditors against the estate of a deceased partner was originally an indirect one, through the surviving partner, but he cites no authority for this view, and the foregoing cases show that the right has always been direct, and not derivative from the survivor's right of contribution.

[11]Hoare *v.* Contencin (1779) 1 Bro. Ch. 27, 29. "I find still greater difficulty to discover a principle, that the plaintiff can come here merely because a party is dead, by which the action is extinguished against him, and survives only against the rest."

[12]*Ex parte* Kendall (1811) 17 Ves. 514, 525. "Without going through all the authorities, and repeating Lord Thurdow's doubt in Hoare *v.* Contencin, and my own surprise, that a court of equity should have interposed to enlarge the effect of a legal contract, the modern doctrine certainly is, that where a man has chosen to take the joint credit of several, though at law his security is wearing out, as each of his debtors dies, yet it is fit that the creditor, whose debt remains at law only against the survivor should resort to the assets of a deceased debtor, and a court of equity will under certain modifications constitute that demand."

[13](1816) 1 Meriv. 530, 563-4.

[14]McCulloch *v.* Dashiell (Md. 1827) 1 H. & G. 96, 105.

[15]*Lex Mercatoria* (1622) p. 303.

[16]What is the Law Merchant? 2 COLUMBIA LAW REVIEW 470, 485; Essays in Anglo-American Legal History, Vol. III, p. 34.

of one or more. Such is still their liability in Scotland.[17] There are many judicial *dicta* to the effect, that the equity doctrine is equally extensive.[18] Following them, Sir Frederick Pollock's original draft of the English Partnership Act contained this provision:

"Art. 15. Every partner is liable jointly with the other partners, and in the case of mercantile contracts (at all events) is also severally liable for all debts and obligations incurred, while he is a partner and in the usual course of partnership business by or on behalf of the firm."

The distinguished draftsman tells us[19] that this article was based on the judicial deliverances, quoted above, as well as on the authority of Lindley on Partnership,[20] and a section of the Indian Contract Act.[21] Many jurists, in this country, have declared "that in equity all partnership debts are to be deemed joint and several."[22]

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[17]Wallace *v.* Plock (1841) 3 D. (Sess. Cas. 2d Ser.) 1047, "Held, that a bill in which a company was an obligant constituted the debt directly against every partner of the company, and was a warrant for diligence against every such partner and his individual estate, the creditor not being bound first to discuss the estate of the company." Bell, Principles of Scotch Law, § 356. English Partnership Act, 1890, § 9: "Every partner is liable jointly with the other partners, and *in Scotland severally also.*"

[18]Williamson *v.* Henderson (1833) 1 M. & K. 582, 2 L. J. Ch. 196, 36 R. R. 386. Sir John Leach, M. R., said, "All the authorities establish that in the consideration of a court of equity, a partnership debt is several as well as joint." Beresford *v.* Browning (1875) L. R. 20 Eq. 564, 45 L. J. Ch. 36, Jessel, M. R., at p. 573, "The law as laid down by Sir Wm. Grant [in Devaynes *v.* Noble, Sleeche's Case, 1 Mer. 539] has never been questioned, that it certainly extends to all mercantile partnerships. There all partnership contracts are several as well as joint." Same case on appeal (1875) L. R. 1 Ch. D. 30, 33 L. T. 524. James, L. J., at p. 34, "The liability of partners for property, acquired by them as copartners is in equity joint and several." Mellish, L. J., at p. 36, "If one partner, retiring, does not cease to be liable at law, I think it clear that if one dies, his estate cannot escape from liability—in other words, the liability is several as well as joint." Baggally, L. J., at p. 37, "There was a joint and several liability on the surviving partners to pay to the executors of a deceased partner, the value of his share."

[19]Pollock, Digest of the Law of Partnership (St. Louis ed. 1878) p. 26. In the 8th edition at p. 44, the author says, "It used to be stated that by the English rule of equity partnership debts are joint and several."

[20]Lindley, Partnership (3rd Eng. ed.) Vol. 1, p. 382. "Partnership liability is in equity not only joint, but also several, except under special circumstances."

[21]Art. 249. "Every partner is liable for all debts and obligations incurred while he is a partner in the usual course of business by or on behalf of the partnership."

[22]Story, Partnership (7th ed.) § 362; Story, Equity Jurisprudence (13th ed.) Vol. I, p. 686. "The ground of the present doctrine is that every partnership debt is joint and several." Reimsdyk *v.* Kane (1813) 1 Gall. 630, 643. Story, J., "The ground of relief in cases of this nature is that the joint contract is in equity deemed a joint and several contract." Har-

EQUITY RULE NARROWED IN ENGLAND.

Before Sir Frederick's draft of the Partnership Act had been passed upon by Parliament, the House of Lords rendered a decision which had the effect of greatly narrowing the equity rule, stated above.[23] The plaintiffs, in this action, had sued to judgment the two ostensible partners in the firm of Wilson and McLay. The judgment debtors proving to be insolvent, and plaintiffs having learned that Hamilton had been a secret partner in the firm, now brought suit against him for the firm debt. His defense was based on the common law theory, that a partnership debt is the joint debt of the partners, and had been merged in the judgment formerly recovered against Wilson and McLay. Plaintiffs insisted that the Judicature Acts had given to the courts of law an equitable as well as a legal jurisdiction, and that rules of equity should prevail in this case. Plaintiffs obtained judgment, at the trial, which was reversed by the Court of Appeal.[24] In the House of Lords, the case was twice argued, first before four law Lords, and a second time, before seven. Notwithstanding considerable "differences of opinion among their Lordships,"[25] the judgment of the Court of Appeal was affirmed, with but one dissenting opinion, that of Lord Penzance. Since that decision, it has not been open to doubt in England, that a partnership contract is the joint contract of the partners: that it is joint in equity as well as at law, except in the case of a partner's death. For the purpose of giving firm creditors a remedy against the estate of a deceased partner, and for that purpose only, equity treats a firm contract as joint and several. Accordingly, Sir Frederick Pollock's proposed article, set out above, was redrawn so as to read as follows:[26]

"Every partner in a firm is liable jointly with the other partners, and in Scotland severally also, for all the debts and obligations of the firm incurred while he is a partner; and after his death his estate is also severally liable in a due course of adminis-

nersly *v.* Lambert (N. Y. 1817) 2 Johns. Ch. 508, 511. Chancellor Kent, "It is in equity, a joint and several debt." 2 Kent Commentaries, p. 58, "For the debt is joint and several, and equally a charge upon the assets of the deceased partner and against the person and estate of the survivor."

[23]Kendall *v.* Hamilton (1879) L. R. 4 App. Cas. 504, 41 L. T. 418.

[24]Kendall *v.* Hamilton (1898) 3 C. P. D. 403, 48 L. J. C. P. 705.

[25]Lord Gordon in 4 App. Cas. at p. 545.

[26]Partnership Act, 1890, § 9. In a note to this section, Sir Frederick Pollock has said of Kendall *v.* Hamilton *supra*, "So far as the result of that case is to establish a difference between the laws of the two countries [England and Scotland], for which there seems to be no rational ground in any difference of mercantile usage, it is perhaps to be regretted." Digest of Partnership (8th ed.) p. 46.

tration for such debts and obligations, so far as they remain unsatisfied, but subject in England or Ireland to the prior payment of his separate debts."

EQUITY RULE PREVAILS IN MANY STATES.

While English judges and legislators, ignoring or forgetting the fact that the rule in equity was but the continuation of the same rule in the Law Merchant, have limited its application to proceedings against the estates of deceased partners, the great majority of our States have established it as the rule to be enforced in all courts. Even at the risk of being tedious, it seems desirable to set forth at some length the statutes and decisions of the several States on this subject.

As early as 1818, the legislature of Alabama enacted that, "Whenever any cause of action may exist against two or more partners, of any denomination whatever, it shall be lawful to prosecute an action against any one or more of them."[27] The courts have repeatedly affirmed that this and other provisions of the Alabama statutes have made all obligations of partners joint and several, and that each partner is a direct and primary debtor, not a mere surety for the firm.[28]

The Arkansas statute is even more sweeping. It declares that "joint obligations shall be construed to have the same effect as joint and several obligations, and may be sued on, and recoveries had thereon in like manner."[29] Under this it was early held that a person having a cause of action against a firm on a firm contract, may sue one or more of the partners at his election.[30]

The Supreme Court of Connecticut holds that "a partnership debt is several as well as joint;" each partner "owes the whole, as if he were alone." Accordingly a firm creditor is entitled to proceed against the estate of a deceased partner, without first exhausting the firm assets or showing that the survivor is insolvent, and is entitled to prove ratably with the separate creditors of the deceased.[31] The following statute has been held applicable

[27]Continued in § 2506, Code of 1907.

[28]Marr *v.* Southwick (Ala. 1835) 2 Porter 351, 370; Green *v.* Payne (1840) 1 Ala. 235; Emanuel *v.* Bird (1851) 19 Ala. 596, 603; Haralson *v.* Campbell (1879) 63 Ala. 278; Dollins & Adams *v.* Pollock & Co. (1889) 89 Ala. 351, 357; Bramlett *v.* Kyle (Ala. 1910) 52 So. 926.

[29]Chap. 116, § 64, L. of 1837, now §§ 4420, 4422, Kirby's Statutes, 1904.

[30]Hamilton *v.* Buxton (1845) 6 Ark. 24; Bradford *v.* Toney (1875) 30 Ark. 763.

[31]Camp *v.* Grant (1851) 21 Conn. 41, 55, 56, 54 Am. Dec. 321; Olmsted *v.* Olmsted (1871) 38 Conn. 309, 328.

to partners as debtors:[32] "A discharge to one of several joint debtors, purporting to discharge him only, shall not affect the claim of the creditor against the other joint debtors."[33]

One of the most explicit enactments as to the several liability of partners is found in the Code of Law for the District of Columbia, passed by the United States Congress, *viz.*

"§ 1205. Every contract and obligation entered into by two or more persons, whether partners or merely joint contractors, whether under seal or not, and whether written or verbal, and whether expressed to be joint and several or not, shall for the purposes of suit thereupon be deemed joint and several."[34]

The Georgia code gives to firm creditors the right to sue the survivor and the personal representative of the deceased partner.[35] This statute, it has been judicially declared, "does not alter or change the liability of partners, as defined by law, but, on the contrary, it assumes that the representative of the deceased partner will protect himself by pleading any legal or equitable defense he may have to such action."[36]

Hawaiian statutes declare the liability of partners in an unregistered partnership to be several,[37] and permit a judgment to be entered against all the members of any partnership, when made defendants, though process is served upon one only, provided the execution should not issue against the separate property of those not served.[38] The Supreme Court holds the liability of partners to be several as well as joint, and recognizes the right of firm creditors to collect their claims from the estate of a deceased partner, without exhausting the firm assets or showing the insolvency of the survivor.[39]

While the legislation of Idaho is not very explicit on this subject the following provision secures to firm creditors all the benefits of several liability on the part of the members:

"Sec. 4147. When the action is against two or more defendants jointly or severally liable on a contract and the summons is served on one or more but not all of them, the plaintiff may proceed

[32]Rice *v.* McMartin (1873) 39 Conn. 573.

[33]Genl. Statutes, 1902, § 655.

[34]The statute is applied in White *v.* Com. Gen. L. Ins. Co. (1910) 34 App. D. C. 460.

[35]Code of Georgia, 1895, §§ 5014, 5015.

[36]Garrard *v.* Dawson (1873) 49 Ga. 434.

[37]Revised Laws, 1905, § 2658. Re Tai Wo Chau Co. (1894) 9 H. 507.

[38]Revised Laws, 1905, § 1741. Stanley *v.* Akoi (1900) 12 H. 344.

[39]Estate of A. Una (1886) 6 H. 606.

against the defendants served in the same manner as if they were the only defendants."[40]

The revised statutes of Indiana provide that "every contract executed jointly by the decedent with any person or persons * * * shall be deemed to be joint and several."[41] This includes partnership contracts.[42]

Firm creditors in Iowa may sue the partnership as such, or may sue all or either of the individual members thereof.[43] Such is the statutory rule in Kansas.[44]

The Kentucky code gives like option to firm creditors, and also permits them to join the representatives of a deceased partner as defendants with the survivor, or to proceed separately against each.[45]

In Louisiana, ordinary partners are joint debtors, but a creditor is permitted to bring his action against all or any of them. Accordingly if he sues one, the defendant cannot plead non-joinder of the others.[46]

Maine has always enabled firm creditors to treat a firm contract as several, upon the death of a partner. Hence they may sue either the survivor, or the estate of the deceased, or may proceed against both in separate suits.[47] This legislative rule was copied from a Massachusetts statute, passed February 26, 1800,[48] and now a part of the Revised Laws of that State.[49]

Maryland not only gives to firm creditors the right to proceed

[40]Revised Codes, § 4112 permits an action to be brought against a partnership in its "common name," in which case the judgment binds the firm property; § 4860 permits the judgment creditor, in a case under § 4147, to summon the non-served partners to show cause why they should not be bound by the judgment.

[41]Revised Statutes, 1908, § 2830.

[42]Newman *v.* Gates (1905) 165 Ind. 171, 175, 72 N. E. 638.

[43]Code, 1897, §§ 3465, 3468. Streichen *v.* Fehleisen (1900) 112 Ia. 612, 615, 84 N. W. 715.

[44]General Statutes, 1909, § 1641. "In all cases of joint obligations and joint assumptions of copartners or others, suits may be brought and prosecuted against any one or more of those who are liable."

[45]Civil Code, 1906, § 27. Williams *v.* Rogers (1879) 77 Ky. (14 Bush) 776, 784; Hunt *v.* Semonin (1881) 79 Ky. 270.

[46]Drew *v.* Bank of Monroe (1910) 125 La. 673, 51 So. 683, applying Act No. 103 of 1870, § 2. Saunders Rev. Civ. Code, § 2085.

[47]Duly *v.* Hogan (1802) 60 Me. 351; R. S. 1903, Ch. 84, § 41. The proceedings upon the death of a partner, by the personal representative of the deceased and by the survivor, respectively, are regulated by Chap. 71. See Burgess *v.* Trust Co. (1907) 103 Me. 378.

[48]Foster *v.* Hooper (1800) 2 Mass. 572.

[49]R. L. 1902, Ch. 141, § 8. Curtis *v.* Mansfield (1853) 65 Mass. (11 Cush.) 152; Sampson *v.* Shaw (1869) 101 Mass. 145, 3 Am. Dec. 327.

against the estate of a deceased partner "in the same manner and to the same extent" as if the deceased had been severally bound,[50] but also provides that a judgment against one or more members of a partnership shall not work an extinguishment or merger of the cause of action, but the others shall remain liable to suit as if their liability had been joint and several.[51]

Since 1846, Michigan has subjected the estate of every deceased joint debtor to a several liability,[52] and has thus enabled firm creditors to proceed at the same time against the surviving partner and against the deceased partner's estate.[53] It also prohibits the merger of a cause of action against joint debtors, in a judgment against one or some of them.[54]

Minnesota applied the common law rule of joint liability of partners,[55] until 1897, when legislation declared that this liability should be several.[56]

In Mississippi all joint debtors, including partners, may be sued separately, and "separate suits may be brought against the representatives of such of the parties as have died."[57]

Similar rights have been accorded to firm creditors, by Missouri statutes, since 1825.[58]

The statutes of Montana present a situation of charming confusion, which has not yet been cleared up by the courts.[59] They declare, "All joint obligations and covenants shall hereafter be

[50]Public General Laws, Art. 50, § 1.

[51]*Ibid.*, § 10. Rhodes & Williams *v.* Amsinck & Co. (1873) 37 Md. 345.

[52]Compiled Laws, 1897, Art. 9385, continuing § 49, Ch. 72, R. S., 1846.

[53]Manning *v.* Williams (1851) 2 Mich. 105; see Stewart's Appeal (1878) 39 Mich. 619.

[54]Bonesteel *v.* Todd (1861) 9 Mich. 371; Mason *v.* Eldred (1867) 73 U. S. (6 Wall.) 231, 18 L. Ed. 783; Compiled Laws, 1897, Art. 10064. Another provision of the statutes permits a firm creditor to release one or more of the partners, after dissolution, without discharging the others. C. L. 1897, Art. 10449.

[55]Beatty *v.* Ambs (1866) 11 Minn. 331 (Gil. 234).

[56]Rev. Laws, 1905, §§ 4282, 4283. Partners may be sued jointly or separately: judgment against one is no ban to an action against the others nor a release of the others, and a firm creditor may discharge one partner, without impairing his right to recover the residue of his debt from the others. Sundberg *v.* Good (1904) 92 Minn. 143, 99 N. W. 638.

[57]Code of 1906, § 2683. Scharff *v.* Noble (1889) 67 Miss. 143, 6 So. 843.

[58]Revised Statutes, 1909, §§ 2769, 2772, continuing Act of Feby. 12, 1825; Oldham *v.* Henderson (1836) 4 Mo. 295; Taylor *v.* Sartorious (1908) 130 Mo. App. 23, 37-8; Willis *v.* Barron (1897) 143 Mo. 450, 45 S. W. 289, 65 Am. St. R. 673.

[59]Carlson *v.* Barker (1908) 36 Mont. 486, 93 Pac. 646, refers to but does not attempt to solve the doubts raised by the statutes.

taken and held to be joint and several obligations and covenants;"[60] that "Where all the parties, who unite in a promise, receive some benefit from the consideration, whether past or present, their promise is presumed to be joint and several,"[61] but that "Every general partner is liable to third persons for all the obligations of the partnership, jointly with his copartners."[62] It would seem to the writer that the first quoted section permits a firm creditor to sue the partners separately, while the last quoted section is intended to restate the common law conception of partners' liability.

It is to be admitted, however, that the Supreme Court of Oklahoma has announced a different conclusion as to the effect of statutes quite similar.[63] Still the Oklahoma laws do not contain either the language or substance of the first quoted Montana section.[64]

No confusion or uncertainty on the topic before us exists in New Jersey. From colonial times, her statutes have permitted creditors to charge the estate of a deceased joint debtor as if such debtors had been severally liable.[65] They also declare that all persons jointly indebted shall be answerable to their creditors separately for such debts.[66]

Even more explicit is the legislation of New Mexico, which provides that all joint contracts, obligations and assumptions of partners and others may be prosecuted against one or more of those so liable, and that suits may be brought by or against a part-

[60]Revised Code, 1907, § 4896.

[61]*Ibid.*, § 5048.

[62]*Ibid.*, § 5489.

[63]Cox *v.* Gille Hardware & Iron Co. (1899) 8 Okla. 483, 58 Pac. 645; McMaster *v.* City Nat. Bank of Lawton (1909) 23 Okla. 550, 101 Pac. 1103.

[64]Complete Laws, 1909, §§ 5008, 5619, 5620, 5962. The Rev. St. of Indian Territory, 1889, §§ 2580, 2581, provided that all joint obligations should be construed to have the same effect as joint and several obligations, and that suits might be brought against the survivor and the representative of the deceased, at the same time. But these sections do not appear to have been carried over into the Oklahoma statutes.

[65]General Statutes, Vol. 2, p. 2336, § 3, continuing the Colonial Act of 1771. Its history is sketched in Harker *v.* Brink (1854) 24 N. J. L. (4 Zab.) 333, 347; Thompson *v.* Johnson (1878) 40 N. J. L. (11 Vroom) 220; Howell *v.* Teel (1878) 29 N. J. Eq. (2 Stew.) 490 with note.

[66]Genl. St. 2, 2336, § 2; U. S. *v.* Griefen (1906) 73 N. J. L., 195, 62 At. 993.

In Greene *v.* Butterworth (1889) 45 N. J. Eq. (18 Stew.) 738, 17 At. 949, and Edison Electric Illuminating Co. *v.* DeMott (1893) 51 N. J. Eq. (6 Dick) 16, 19, 25 At. 952, it is said that partnership debts are held to be joint and several in equity.

nership as such, or against all or each of the individual members thereof.[67]

To the same effect are the statutes and decisions in North Carolina.[68]

Ohio legislators have been content with making joint obligations joint and several only as against the estates of a deceased joint debtor.[69] Such "estate is liable to every legal remedy, as fully as though the contract had been joint and several."[70]

The statutes and decisions of Pennsylvania[71] are of the same tenor with those of Ohio.

Rhode Island does not go quite so far, when the joint debtors are partners, providing in that case that the plaintiff shall first exhaust the partnership estate, before he is allowed to charge the separate estate of the deceased partner upon its several liability.[72]

Tennessee subjects all joint debtors, including partners, to several liability, the original statute dating from 1789.[73]

Texas statutes permit the estate of a deceased joint debtor to be charged as if he had been severally liable,[74] and the Supreme Court has decided that "in equity, every partnership debt is joint and several, and, therefore, the creditor may, at the same time, sue the survivor as such, and proceed against the estate of the deceased partner."[75]

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[67]Compiled Laws, 1897, §§ 2894, 2895, 2943. Applied in Curran *v.* Kendall Boot & Shoe Co. (1896) 8 N. M. 417, 45 Pac. 1120; U. S. *v.* Gumm Bros. (1899) 9 N. M. 611, 614, 58 Pac. 398.

[68]Revisal, 1908, §§ 413, 415. Rufty *v.* Claywell, Powell & Co. (1885) 93 N. C. 306; Hanstein *v.* Johnson (1893) 112 N. C. 254, 17 S. E. 155; Davis *v.* Bessemer City Cotton Mills (1910) 178 Fed. 784.

[69]General Code, 1910, § 10733. Weil *v.* Guerin (1884) 42 Oh. St. 299; Williams *v.* Bradley (1890) 5 Oh. C. C. 114.

[70]Burgoyne *v.* Ohio Life Ins. & F. Co. (1855) 5 Oh. St. 586.

[71]P. L. 536, Act of April 11, 1848, § 4; Act, March 22, 1861; Moors' Appeal (1859) 34 Pa. St. 411; Dingman *v.* Amsinck (1874) 77 Pa. St. 114; Hughes's Estate, Hughes's Appeal (1900) 13 Pa. Super. Ct. 240; Blair *v.* Wood (1885) 108 Pa. St. 278. At p. 283 the court said: "In the class of cases to which this act applies, its purpose is to make the indebtedness several, which was joint before. * * * The debt is treated as if it was the individual debt of the decedent. * * * The estate of the decedent becomes liable for the whole debt of the firm of which he was a member."

[72]Genl. Laws, 1909, Ch. 283, §§ 17, 18, Ch. 185. Island Savings Bank *v.* Galvin (1896) 19 R. I. 569, 36 At. 1125; Nat. Exch. Bk. *v.* Galvin (1897) 20 R. I. 159, 37 At. 811; Providence Savings Bank *v.* Vadnais (1903) 25 R. I. 295, 55 At. 754.

[73]Code, 1896, § 4486, continuing 1 Hay. Rev., p. 175, § 5. Gratz & Co. *v.* Stump (1814) 3 Tenn. (Cooke) 493, suit against one partner on a firm note; Sully *v.* Campbell (1897) 99 Tenn. (15 Pick.) 434, 42 S. W. 15.

[74]Sayles' Statutes, Art. 2071.

[75]Gant *v* Reed (1859) 24 Tex. 46.

Vermont legislation subjects the estate of a deceased joint debtor to a several liability;[76] authorizes a separate action against the resident partner by a firm creditor;[77] permits such creditor to discharge one partner without affecting his right to recover the balance of the firm debt from the other partners,[78] and declares that an unsatisfied judgment against one or more of several joint debtors does not discharge the others.[79]

Virginia statutes accord to the firm creditor very nearly the same rights as do those of Vermont.[80]

By judicial decisions in West Virginia "all contracts with partners are joint and several. * * * Such being the case, a creditor has the right to sue one or all, and take judgment against one or all."[81]

In Colorado and Illinois, the courts have held that a statute declaring, "all joint obligations and covenants shall be taken and held to be joint and several obligations and covenants,"[82] does not apply to partnership contracts. But in each State, it is held that the death of a partner severs the joint obligation, so that the creditor, thereafter, may proceed against the estate of the deceased, without exhausting firm assets; and a judgment against either the survivor or the representative of the deceased is no bar to an action against the other.[83]

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[76]Public Statutes, 1906, § 1527.

[77]*Ibid.*, § 1525.

[78]*Ibid.*, § 1528.

[79]*Ibid.*, § 1533. See People's Nat. Bank *v.* Hall (1904) 76 Vt. 280, 56 At. 1012, construing and applying § 1525 *supra.*

[80]Code of 1904, § 2855, declares that the death of a partner subjects his estate to a several liability for firm debts. § 2856 permits a creditor to compromise with one joint debtor, without impairing the obligation of the others. § 3396 provides that when plaintiff has served process on one of several defendants, he may proceed to judgment against him; and then proceed against the others.

[81]Lee *v.* Hassett (1895) 41 W. Va. 368, 23 S. E. 559; Weimer *v.* Rector (1897) 43 W. Va. 735, 737, 28 S. E. 716; Courson *v.* Parker (1894) 39 W. Va. 521, 20 S. E. 583. See Code, 1906, §§ 3037, 3451.

[82]Colo. R. S., 1908, § 3604. Thompson *v.* White (1898) 25 Colo. 226, 54 Pac. 718. Ill. R. S. 1906, Ch. 76, § 3. Fleming *v.* Ross (1907) 225 Ill. 149, 80 N. E. 92, affg. (1906) 125 Ill. App. 265, and following Sherburne *v.* Hyde (1900) 185 Ill. 580, 57 N. E. 776, modifying Sandusky *v.* Sidwell (1898) 173 Ill. 493, 50 N. E. 1003.

[83]Doty *v.* Irwin-Phillips Co. (1900) 15 Colo. App. 96, 61 Pac. 188; Doggett *v.* Dill (1884) 108 Ill. 560, 4 Am. R. 565. In the last cited case it is said: "A partnership debt is joint and several, and the creditor has the right to elect whether he will proceed against the assets in the hands of the surviving partner, or against the estate of the deceased." It is difficult to understand why a court, which holds that doctrine, should have rendered the decision it did in the cases cited in the last preceding note.

From the foregoing review of statutes and decisions it appears that twenty-three jurisdictions have changed the common law liability of partners from joint to several, while nine other jurisdictions hold the estate of a deceased partner to a several liability for firm debts.

Of the remaining States and Territories most have so changed the common law as to permit a firm creditor to take judgment against one or more partners, without affecting his claim against the others, provided he has made all of them defendants;[84] and also to compromise with and discharge one or more partners, without releasing the others.[85]

SELIGMAN *v.* FRIEDLANDER.

Such was the state of the law in this country on the topic before us, when the New York Court of Appeals was called upon to construe the following section of the Partnership Law:

"Every general partner is liable to third persons for all the obligations of the partnership, jointly and severally with his general copartners."[86]

This section had been construed by the Appellate Division of the Supreme Court for the First Department to mean what it unequivocally said, *viz.*, that "the obligation of the partners is joint and several."[87] The same construction had been put upon it by the United States Circuit Court of Appeals for the Fourth Circuit.[88]

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[84]Arizona R. S., 1906, §§ 1348, 1436; Cal. Civ. Proc. Code, §§ 414, 989; Ingraham *v.* Gildermester (1852) 2 Cal. 88; Florida Genl. St., 1906, § 1404; Bank *v.* Greig (1901) 43 Fla. 412, 31 So. 239; N. Y. Code Civ. Proc. §§ 1932-1941; North Dak. Code of Civ. Proc., 1905, § 6847; S. C. Code Civ. Proc., § 157; Utah Compiled Laws, 1907, §§ 2920, 2954, 3201; Wis. Statutes, 1898, § 2884, and see § 3848 as to effect of death of one joint contractor, construed in Sherman *v.* Kreul (1877) 42 Wis. 33.

[85]Cal. Civil Code § 1543; Northwestern Ins. Co. *v.* Potter (1883) 63 Cal. 157; N. Y. Consol. Laws, Vol. I, p. 490, §§ 230, 231; S. C. Civil Code, 1902, § 2841, after dissolution of a firm; Utah Compiled Laws, 1907, § 2037; Wis. Sts., 1898, § 4204.

[86]Consolidated Laws, Vol. III, p. 2522, § 6 continuing Ch. 420, L. 1897.

[87]Seligman *v.* Friedlander (N. Y. 1910) 138 App. Div. 784, 123 N. Y. Supp. 583. After quoting the section set out above, the court said: "'The statute fixes the liability, and, * * * if language means anything, then general partners are jointly and severally liable to the creditors of the firm. If severally liable, then each could have been sued separately at law, and in case of death the action could be revived against the personal representatives of the deceased defendant.' The decision was unanimous.

[88]Davis *v.* Bessemer City Cotton Mills (1910) 178 Fed. 784. "Was Eldridge personally and individually liable for the breach of contractual duty by the firm of which he was a member? This depends upon the law of New York." The court then quotes the section set out above, construes it to mean precisely what the North Carolina statute does, which

The reasons given by the Court of Appeals for repudiating this construction are as follows. First:

"At common law the liability of copartners was joint, although it was several in equity. The fundamental principle upon which the partnership relation is founded is that of a joint adventure, with joint ownership of assets and only joint liability for debts, *unless the property held jointly is insufficient to pay the firm debts, or it appears that there can be no effective remedy without resort to individual property. * * * The theory of the law was that the joint liabilities should be paid from the joint property if possible and not until the remedy was exhausted, or resort thereto shown to be useless, could payment from the individual property be exacted.*"[89]

With all due respect to the learned court, the doctrine stated in the lines which we have italicised, is not now and never has been the rule of the common law, either in England, or in New York, or in any other of our States. On the contrary, the common law rule was announced by Lord Mansfield nearly a century and a half ago as follows: "If the action be brought against all, the plaintiff may take out execution against anyone."[90] It was stated by Lord Eldon in these words: "If any creditor had brought an action, the action would be joint; his execution might be either joint or several. He might have taken in execution both joint and separate effects."[91] This rule was affirmed by the New York Court of Appeals in this language: "There is no doubt that at law the judgment for a partnership debt attaches and becomes a lien upon the real estate of each of the partners, with the same effect as if such judgment were for the separate debt of such partner;"[92] and in the following extract, which the court quotes approvingly from the Maryland Court of Appeals: "At law the joint creditor may pursue both the joint and separate estate, to the extent of each, for the satisfaction of their joint demands, which are at law considered joint and several, *without the possibility of the inter-*

reads: "In all cases of joint contracts of copartners in trade or others, suit may be brought against all or any number of the persons making such contract" (Revisal, 1905, § 413, applied in Hanstein *v.* Johnson (1893) 112 N. C. 254, 17 S. E. 155), and adds, "It is clear, therefore, that Eldridge could have been sued individually upon the cause of action existing against the partnership." Although this decision was made some months before that of the N. Y. Court of Appeals, it seems not to have been cited by counsel, nor known to the court.

[89]Seligman *v.* Friedlander (1910) 199 N. Y. 373, 376, 92 N. E. 1047, 1048.

[90]Rice *v.* Shute (1770) 5 Burr. 2611, 2 W. Bl. 696.

[91]*Ex parte* Ruffin (1801) 6 Ves. 119.

[92]Meech *v.* Allen (1858) 17 N. Y. 300, 72 Am. Dec. 465.

position of any restraining power of a court of equity."[93] Such interposition was sought and refused in the New York case just referred to, as well as in the following cases from Indiana[94] and Iowa,[95] where it was shown that there were ample firm assets from which the judgment creditor could have collected his judgment. The same rule is expressly declared by the Supreme Court of the United States,[96] and by various state courts.[97] Indeed, so far as the writer knows, there is not a single common law jurisdiction which holds the doctrine, announced in *Seligman* v. *Friedlander,* as the first reason for the decision.

The second reason assigned by the Court of Appeals for its decision, is that the construction put upon the quoted section by the Appellate Division would work a radical change in the common law; and courts will not presume such a change intended, unless the meaning of the statute is unmistakable. Exactly. But if the language in question is not unmistakable, pray what language could be? To requote from the Appellate Division: "If language means anything then general partners are jointly and

[93]McCulloch *v.* Dashiell (1827) 1 H. & G. 96, 105. The italics are those of the N. Y. Court of Appeals.

[94]Dean *v.* Phillips (1861) 17 Ind. 406, 409. A partner's "separate property is equally liable with the joint property, both in law and equity for the payment of the joint debts." Newman *v.* Gates (1905) 165 Ind. 171, 175, 72 N. E. 638. "A judgment binds the partnership property and the individual property of each judgment debtor, and may in the absence of statute, be enforced by execution against the separate property of each, before having recourse to the partnership property."

[95]Hamsmith *v.* Espy (1862), 13 Ia. 439; Gillaspy *v.* Peck (1877) 46 Ia. 461.

[96]Lewis *v.* U. S. (1875) 92 U. S. 618, 623, 23 L. Ed. 513. "If a judgment at law be recovered against a copartnership, the separate property of each partner is alike liable to execution with the property of the partnership."

[97]Camp *v.* Grant (1851) 21 Conn. 41; Cleghorn *v.* Ins. Bank (1851) 9 Ga. 319; Baker *v.* Wimper (1856) 19 Ga. 87; Stout *v.* Baker (1884) 32 Kan. 113, 4 Pac. 141; Williams *v.* Rogers (1819) 77 Ky. (14 Bush) 776, 785, "The execution plaintiff has the election to coerce payment after judgment from anyone of the defendants in the execution;" Allen *v.* Wells (1839) 39 Mass. (22 Pick.) 450; Stevens *v.* Perry (1873) 113 Mass. 380; William *v.* Lippincott (1856) 9 N. J. Eq. (1 Stock.) 353; Cummings' Appeal (1855) 25 Pa. St. 268; Kuhne *v.* Law (S. C. 1866) 14 Rich. L. 18, 27, "At law the firm and every partner in it is bound for a partnership debt. The liability is said to be joint and several; but the contract is joint only. Suits against partners severally could not be sustained. Each of them is the agent of the others, and the law makes no distinction between an execution against them as partners and one against them as joint contractors acting each for himself. Either execution has a lien upon the goods of every one of them, and satisfaction of either execution may be exacted from any one of them." This case overruled Roberts *v.* Roberts (S. C. 1854) 8 Rich. L. 15; Straus *v.* Kerugood (1871) 62 Va. (21 Gratt.) 584.

severally liable to the creditors of a firm," under a statute which reads: "Every general partner is liable to third persons for all the obligations of the partnership jointly and severally with his general copartners."

The third reason assigned is, that the section was not intended by the legislature to apply to the members of an ordinary partnership, but to be confined to the general partners in a limited partnership. This view, it is submitted, is not sustained by the arrangement and headings as they appear in the original Act or in the Consolidated Laws. Article one, in the Consolidated Laws, is entitled "Short Title: Definition," and consists of four sections; the first one is headed, "Short Title," the second, "Partnership Defined," the third, "General Partnership," and the fourth, "Limited Partnership." Article two is entitled "General Provisions" and consists of three sections, section five being headed "Authority of General Partner," section six, "Liability of General Partner," section seven, "Liability of Special Partners." Article three is entitled "Business and Partnership Names" and has three sections severally headed, "When partnership in business names may be continued;" "Certificate to be filed and recorded; clerk's fees;" and "Fictitious firm names prohibited." Article four is entitled "Limited Partnerships" and embraces thirteen sections which contain the rules regulating the formation, the conduct and the dissolution of such partnerships. Section thirty-six expressly declares the liability of "the general partners in such partnership."

It is apparent, we submit, that the draftsmen of the Act and the editors of the Consolidated Laws understood sections five and six to apply to all partnerships. Section two defines a partnership in terms which distinguish it from all other associations. Section three defines a general partnership as distinguished from a limited partnership which is defined in section four. Then comes a new article entitled "General Provisions"—certainly a misnomer, if the three sections which it contains are, together with section four, "confined to limited partnerships," as the Court of Appeals declares. Not only is there a misnomer, but there is a blunder in dividing the sections, for under the court's ruling section four should be in Article two instead of Article one. On the other hand, if section five is understood as a "general provision" describing the authority of "every general partner," and section six as another "general provision," describing the liability of "every general partner," whatever be the species of partnership in which

he is found, then the division of Articles one and two, and their titles are beyond criticism.

Again. If section six is "confined to limited partnerships," and states only the liability of the general partners in such partnerships, it becomes surplusage; for section thirty-six in Article four, expressly declares: "The general partners in such partnership shall be jointly and severally liable as general partners are by law." If the court's construction of the statute is correct, section six is as useless and as troublesome as the vermiform appendix.

The fourth reason assigned by the court for its decision is found in the following extract:

"When a partnership debt is incurred, it presumptively creates partnership assets and should in reason be paid therefrom, and not until they are exhausted should individual property be proceeded against. No reason is apparent for leaving all the assets in the possession of the survivors upon the death of one of the partners and yet making the representatives of the latter liable in the first instance without touching the partnership assets. The inconvenience and injustice of suing half a dozen partners individually in as many separate actions without suing the partnership proper or the partners jointly at all is so obvious as to enjoin upon the courts extreme caution in construing a statute alleged to permit that result, and, where the language used admits of another construction to adopt it as expressing the real intention of the Legislature. Such is the case before us, and we thus reach the conclusion that the liability of partners in a general partnership was not changed by section 6 of the partnership law."

Evidently, the facts set forth in the earlier part of this article, were not brought to the attention of the learned court. If it had been familiar with them, it would hardly have indulged in its jeremiad over the "inconvenience and injustice" of permitting separate actions against partners, and especially of permitting the firm creditor to proceed against the representatives of a deceased partner "in the first instance without touching the partnership assets." Precisely this rule of "inconvenience and injustice" has run riot in some of our States for more than a century; and, stranger still, it has so commended itself to perverse legislators, as to secure enactment in about three-fourths of our jurisdictions. In view of these facts it seems passing strange that our Court of Appeals should have insisted on keeping our State in the ranks of the minority, notwithstanding the unequivocal language of the statute. Undoubtedly, section six of the Partnership Act must now be accepted by litigants in this State to mean not what it says,

but what the learned Court of Appeals says that it says. For that court possesses all the authority over the meaning of words, which Humpty Dumpty claimed for himself in Alice Through the Looking-Glass. "When *I* use a word," said he, "it means just what I choose it to mean—neither more nor less." And that court solemnly holds that the common law liability of partners has not been changed by section six: that such partners remain "liable jointly at law."

But if this section is to be so construed, then it does change the common law rule as to the liability of partners for tort obligations. That has always been considered "joint and several."[98] Yet, the language of section six is, "Every general partner is liable to third persons for *all* the obligations of the partnership, jointly and severally with his general copartners." If that means "joint liability at law," in case of contract obligations, it must mean the same in case of tort obligations; in which event, the section does work a change in the common law. Of course, the learned court may say that the term obligations embraces only contract obligations; or, having committed itself to the view that the statute is not to be allowed to change existing rules, the court may say that partners are liable jointly for contract obligations and severally for tort obligations.

Whatever its decision upon that point may be, it cannot exceed the present decision in breeding distrust as to the meaning of the plainest statutory declarations.

FRANCIS M. BURDICK.

COLUMBIA UNIVERSITY.

[98]Rice *v.* Shute (1770) 5 Burr. 2611, 2 W. Bl. 696; Mitchell *v.* Tarbutt (1794) 5 D. & E. 649; Ansell *v.* Waterhouse (1817) 6 M. & S. 385; British Partnership Act 1890, §§ 11, 12; Murphy *v.* Coppieters (1902) 136 Cal. 317, 68 Pac. 970; Roberts *v.* Johnson (1874) 58 N. Y. 613; Matter of Blackford (N. Y. 1898) 35 App. Div. 330, 54 N. Y. Supp. 972; White *v.* Smith (S. C. 1860) 12 Rich. L. 595.